IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROSETTA M. MUNDY,	:	
	:	
PLAINTIFF,	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, et al.,	:	NO. 00-1627
	:	
DEFENDANTS.	:	

MEMORANDUM AND ORDER

McLaughlin, J. December _____, 2000

The plaintiff, Rosetta M. Mundy, has brought a civil action against the defendants, the City of Philadelphia ("City"), the Minority Business Enterprise Council ("MBEC"), Ogden Allied Leisure Services, Inc. ("Ogden"), and Veterans Stadium Associates Limited Partnership ("Veterans Stadium"). The plaintiff alleges that the City and MBEC induced her to enter into an unconscionable contract with Ogden and Veterans Stadium which requires her to pay for certain beer-related costs, but prevents her from sharing in the revenues. The plaintiff has also brought claims against Ogden and Veterans Stadium under the federal RICO statute and the Pennsylvania unconscionability statute.

Each set of defendants has filed a motion to dismiss the claims against them. The Court will grant the motion by Ogden and Veterans Stadium as to the federal RICO claim because the statute of limitations period has expired, the plaintiff has improperly pleaded the statute, and the

alleged activities do not amount to "racketeering." The Court will remand all state law claims against the defendants to the Philadelphia Court of Common Pleas.

I. Background

According to the Amended Complaint, the plaintiff is an African-American female who is a concessions stand sublicensee at one of the Philadelphia stadiums. In support of her Amended Complaint, the plaintiff initially attached a sublicense contract dated July 17, 1990, between Veterans Stadium and a corporation called "A to Z Inc." The plaintiff's name does not appear anywhere on that contract. Subsequently, the plaintiff submitted a document that she has identified as "the appropriate contractual agreement." See Pl. Letter of Sept. 15, 2000. That document, dated July 31, 1987, is a sublicense agreement between the plaintiff and Ogden for food and beverage concessions at John F. Kennedy Stadium (the "Sublicense Agreement"). This memorandum will discuss the July 31, 1987 Sublicense Agreement,[1] but the Court's conclusions would remain the same regardless of which contract is considered.

The plaintiff alleges that under the Sublicense Agreement, the plaintiff has been required since 1988 to purchase supplies from Ogden and to pay for the salaries of employees to sell beer at certain stadium events. The plaintiff also alleges that she has not received any of the proceeds from the beer sales at those stadium events. The plaintiff states that she has renewed her contract regularly to avoid losing her concession stand, and that she remains under contract until the year 2001. See Am. Compl. at ¶¶ 1, 8, 20, 21, 48-50.

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[1] The contract dated July 17, 1987 will henceforth be cited to as "Pl. Ex. A, Letter of Sept. 15, 2000," followed by the internal page number.

The Sublicense Agreement provides that Ogden grants to the plaintiff, as Sublicensee, the "exclusive license to sell food and non-alcoholic beverages at those concession stands at the Stadium." The Sublicense Agreement further provides that "during events at the Stadium during which beer is permitted to be sold, OALS [Ogden] shall cause its employees to sell beer from the Stands, and the Sublicensee shall reimburse OALS for all wages and other labor costs of such employees during such events. . . ." Finally, the Sublicense Agreement states that "[a]ll personnel performing services at the Stands shall be employees of the Sublicensee and not of OALS. The Sublicensee shall be responsible for the hiring and firing of its own employees." See Pl. Ex. A, Letter of Sept. 15, 2000, at 1-3, 5.

The plaintiff filed a Complaint in the Philadelphia Court of Common Pleas on November 12, 1999 and an Amended Complaint on March 9, 2000. The defendants removed the case to federal court on March 29, 2000. The Amended Complaint alleges that the City and MBEC made material representations to the plaintiff in order to induce her to enter into the Sublicense Agreement (Counts I and II). The plaintiff also claims that Ogden and Veterans Stadium acted unconscionably in entering into the Sublicense Agreement with the plaintiff, in violation of 13 Pa. C.S. § 2302(a) (Counts III and IV). Finally, the plaintiff claims that Ogden and Veterans Stadium violated the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 ("RICO"), by devising a scheme to diverts assets of the plaintiff to themselves (Count V). The plaintiff seeks damages of $434,255.00, representing the amount she paid from 1992 to 1998 for employees supplied by Ogden or Veterans Stadium to serve beer at the Stadium. The plaintiff also seeks treble damages.

The City and MBEC have filed a motion to dismiss the state law claims against them. Ogden and Veterans Stadium have also filed a motion to dismiss, to which I now turn.

II. Discussion

A. Standard of Review

A motion to dismiss pursuant to Rule 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, the plaintiff is not entitled to relief. See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir. 1997) (citing Bartholomew v. Fischl, 782 F.2d 1148, 1152 (3d Cir. 1986)).

B. Federal RICO claim (Count V)

The plaintiff has brought a federal RICO claim against Ogden and Veterans Stadium, arguing that they schemed to divert assets of the plaintiff to themselves. Specifically, the plaintiff claims that the Sublicense Agreement unfairly requires her to pay for costs that should be borne by Ogden and Veterans Stadium. In response, Ogden and Veterans Stadium argue that the statute of limitations has expired, that the plaintiff has failed to properly plead a violation under the RICO statute, and that the alleged activities do not amount to "racketeering activity" within the meaning of the statute.

1. Statute of limitations

Federal RICO claims are subject to a four-year statute of limitations period that begins to run when a plaintiff discovers (or should have discovered) her injury. See Rotella v. Wood, 120 S. Ct. 1075, 1078-79 (2000). In the instant case, the plaintiff alleges that she entered into the

Sublicense Agreement on July 31, 1987. The plaintiff further alleges that since 1988, she has been required to pay certain expenses of the stadium beer sales without being able to share in the proceeds. These allegations make clear that she knew or should have known of her alleged injury beginning in 1988. Consequently, the applicable four-year period began to run in 1988 and lapsed in 1992. The institution of this suit in November of 1999, more than ten years after the plaintiff knew or should have known of her injury, is well outside of the limitations period. Thus, the plaintiff's claims against Ogden and Veterans Stadium should be dismissed.

2. The RICO statute (18 U.S.C. § 1962(c))

Ogden and Veterans Stadium also argue that the plaintiff has failed to properly plead a violation under the RICO statute. That statute provides, in relevant part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity....

18 U.S.C. § 1962(c). This is the section relied upon by the plaintiff in the Amended Complaint. See Am. Compl. at ¶ 54.

Under the RICO statutes, "person" includes "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). "Enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

The plaintiff's Amended Complaint identifies herself as the "person" and Ogden and Veterans Stadium as the "enterprise." As Ogden and Veterans Stadium point out, this reading would have the plaintiff bringing a claim against herself for conducting the "enterprise's affairs

through a pattern of racketeering activity." Because liability attaches only to the "person" and not to the enterprise, this reading would also relieve the defendants of liability. See Jaguar Cars, Inc. v. Royal Oaks Motor Corp., 46 F.3d 258, 268 (3d Cir. 1995); Baglio v. Baska, 940 F. Supp. 819, 832 (W.D. Pa. 1996), aff'd by 116 F.3d 467 (3d Cir. 1997).

The plaintiff almost surely did not mean such a nonsensical result. It may be that she meant to name Ogden and Veterans Stadium as the "persons," with the "enterprise" being their unofficial association. Alternatively, she may have meant to name individual employees of Ogden and Veterans Stadium, rather than herself, as the "persons." See, e.g., Jaguar Cars, 46 F.3d at 268. Regardless of what she may have meant, the plaintiff has failed to properly plead a claim against Ogden and Veterans Stadium under the RICO statute.[2]

3. "Racketeering activity"

Even if the statute of limitations had not run and the plaintiff had properly pleaded the parties' roles, the RICO claim against Ogden and Veterans Stadium would still require dismissal because the plaintiff has failed to allege acts sufficient to constitute predicate acts of

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[2] The plaintiff argues that a corporation can be sued under a theory of respondeat superior where it has benefited from racketeering income. See Pl. Resp. II, at 4 (citing Petro-Tech, Inc. v. Western Co. of North America, 824 F.2d 1349 (3d Cir. 1987)). However, the plaintiff's reliance on Petro-Tech is miplaced. Petro-Tech's holding was limited to liability under Sections 1962(a) and (b). The opinion specifically foreclosed respondeat superior liability under Section 1962(c), the statute under which the plaintiff brings her claim. As the court held: "[i]t is thus possible for an employer alleged to be an enterprise under § 1962(c) to have benefited from the racketeering activity. Indeed, it may be common. But that does not matter under Enright so long as no attempt is made to recover from the employer. Respondeat superior circumvents the prohibition on recovery . . . and is therefore impermissible under § 1962(c)." 823 F.2d at 1360 n. 11 (citing Hirsch v. Enright Refining Co., 751 F.2d 628 (3d Cir.1984)). Thus, the plaintiff's allegations that Ogden and Veterans Stadium were the "enterprises" means that Section 1962(c) liability cannot attach to either of them.

racketeering. In order to recover under Section 1962(c) of the RICO statute, the plaintiff must prove the following four elements: (1) that there was an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and (4) that the defendant participated through a pattern or racketeering activity that included at least two predicate acts. See Annulli v. Panikkar, 200 F.3d 189 (3d Cir. 1999). The plaintiff also must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. See H.J. Inc. v. Northwestern Bell Telephone Co., 109 S.Ct. 2893, 2900 (1989); Tabas v. Tabas, 47 F.3d 1280, 1292 (3d Cir. 1995).

18 U.S.C. § 1961(1) contains a list of the acts which Congress has determined to constitute "racketeering activity." They include, inter alia, murder, gambling, bribery, dealing in a controlled substance, mail fraud, and interstate transportation of stolen property. Of these acts, the plaintiff has alleged that the defendants engaged in mail fraud, bank fraud, and conspiracy. See Am. Compl. ¶ 54. However, the plaintiff has failed to "flesh out" her legal conclusions by alleging the specific acts constituting such conduct. The only references in the Amended Complaint relating to the alleged acts are the citations to the RICO statute. The plaintiff has therefore failed to "specify the nature of the predicate acts to a degree that will allow the defendants to comprehend the specific acts to which they are required to answer." See Rose v. Bartle, 871 F.2d 331 (3d Cir. 1989) (citation omitted); Eisenberg v. Davidson, 1996 WL 167626, at *5 (E.D. Pa. Apr. 9, 1996).

Indeed, the facts alleged by the plaintiff in the Amended Complaint support only the allegation that Ogden and Veterans Stadium "scheme[d] to defraud and to steal." See Am.

Compl. ¶¶ 48-50. However, state law crimes such as theft and fraud are insufficient to allege a pattern of racketeering activity for federal RICO purposes. See Annulli, 200 F.3d at 199.

In response, the plaintiff contends that her Amended Complaint "demonstrate[s] a substantial or meaningful nexus between the affairs of the enterprise and the pattern of racketeering activity," and that ongoing discovery "may demonstrate that the criteria of section 1962(c) will be met." See Pl. Resp. II, at 4-5. Even if the alleged "nexus" is taken to be true, the plaintiff would still have to allege specific acts of racketeering before the plaintiff's case can be permitted to proceed to the discovery stage. I find, therefore, that the plaintiff has failed to establish a prima facie RICO case sufficient to withstand a motion for dismissal.

C. State law claims (Counts I, II, III, and IV)

Pursuant to the Supreme Court's direction in Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350-53 (1988), I decline to assert jurisdiction over the remaining state law claims: the breach of contract claim against the City and MBEC (Counts I and II), and the unconscionability claims against Ogden and Veterans Stadium (Counts III and IV). These claims are remanded to the Philadelphia Court of Common Pleas.

An Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROSETTA M. MUNDY,	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, et al.,	:	NO. 00-1627

ORDER

AND NOW, this day of December, 2000, upon consideration of the Motion to Dismiss (Docket #3) filed by Defendants Ogden Allied Leisure Services, Inc. and Veterans Stadium Associates Limited Partnership, and Plaintiff's Response thereto, IT IS HEREBY ORDERED that the Motion is GRANTED IN PART and DENIED IN PART for the reasons expressed in the Memorandum of today's date. The Motion is Granted as to Count V of the Plaintiff's Amended Complaint. The Motion is Denied as to Counts III and IV, which are remanded to the Philadelphia Court of Common Pleas.

AND FURTHER, upon consideration of the Motion to Dismiss (Docket #2) filed by Defendants the City of Philadelphia and the Minority Business Enterprise Council, and the Plaintiff's Response thereto, IT IS FURTHER ORDERED THAT the Motion is DENIED for the reasons expressed in the Memorandum of today's date. Counts I and II of the Plaintiff's Amended Complaint are remanded to the Philadelphia Court of Common Pleas.

BY THE COURT:

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MARY A. McLAUGHLIN, J.